No. 88-1541

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In the Supreme Court of the United States

OCTOBER TERM, 1989

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
AND
CF&I STEEL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In this case, the court of appeals held that, when the Secretary of Labor and the Occupational Safety and Health Review Commission issue conflicting interpretations of a Department of Labor regulation, judicial deference should be accorded to the Commission, rather than to the Secretary. Pet. App. 2a. In our petition, we demonstrated that this issue is of recurring importance to the administration of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq.* We also showed that the issue has produced a widespread split in the courts of appeals. In response, respondent seeks to mini-

mize both the importance of the issue and the severity of the split in the circuits. Respondent's efforts are unavailing.

1. In seeking to minimize the significance of the court of appeals' holding, respondent contends, first, that the holding is limited because, under the court of appeals' analysis, the issue of deference will be pertinent only if the Secretary's "interpretation is clearly wrong," or "*when the regulatory standard itself is ambiguous.*" Br. in Opp. 13 (emphasis added). But as this Court has emphasized repeatedly, it is precisely when a regulation is ambiguous that the issue of deference arises, and precisely then that deference to the promulgating entity is most appropriate.[1] Far from limiting the scope of the court of appeals' holding, the requirement of deference to the *Commission* when the *Secretary's* regulation is ambiguous highlights the importance of that holding for the application of basic principles of judicial deference. See Pet. 11 n.8.[2]

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[1] See, *e.g.*, *Immigration and Naturalization Service* v. *Stanisic*, 395 U.S. 62, 72 (1969) ("Granting that this regulation and its successor provision are not free from ambiguity, we find it dispositive that the agency responsible for promulgating and administering the regulation has interpreted it" in a particular manner); *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965) ("The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it."); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1945) ("[A] court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."). Cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[2] Respondent's emphasis on the court of appeals' requirement of Commission deference to the Secretary (Br. in Opp. 13, 24) similarly does not limit the significance of the decision because that requirement explicitly does not apply when a regulation is ambiguous. See Pet. App. 9a; Pet. 14 & n.11.

Respondent also seeks to minimize the importance of the court of appeals' decision because, according to respondent, the court of appeals did not explicitly hold that the Secretary's interpretation was reasonable. Br. in Opp. 13-14. But regardless of whether the court of appeals' opinion is read as having expressed a view on the reasonableness of the Secretary's interpretation,[3] the dispositive question for the court of appeals was whether the *Commission's* interpretation of the ambiguous regulation was reasonable. As the court stated, "in the face of conflicting regulatory interpretations, deference is properly accorded to the interpretation of the Commission." Pet. App. 2a. In contrast, under a correct application of deference principles, the dispositive question should have been whether the *Secretary's* interpretation was reasonable. See, *e.g.*, *United Steelworkers* v. *Schuylkill Metals Corp.*, 828 F.2d 314, 319 (5th Cir. 1987). Respondent does not and could not contend that the court of appeals held the Secretary's interpretation to be unreasonable; under a regime of deference to the Secretary, such a finding would be the only justification for rejecting the Secretary's interpretation.

Respondent further suggests that the issue in this case is limited because it is confined to "the unique statutory framework" of the OSH Act. Br. in Opp. 17. As we pointed out in our petition (at 16-17 & nn.15, 16), the OSH Act administrative structure has analogues in other statutory contexts, including the Federal Mine Safety and Health Act (30 U.S.C. 801 *et seq.*), the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), and the Black Lung Benefits Act (30 U.S.C. 901 *et seq.*). Even if the issue were confined to the OSH Act,

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[3] We note that, in deferring to the Commission's interpretation, the court of appeals observed that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language." Pet. App. 11a.

however, review would still be warranted. The OSH Act is an important federal statute designed to ensure workplace safety (see generally 29 U.S.C. 651), and, as the numerous courts of appeals decisions addressing this subject reveal (see Pet. App. 4a-5a), the question of deference arises with frequency.

2. Respondent also seeks to minimize the split in the courts of appeals concerning this issue. Br. in Opp. 15-17. Respondent maintains that "the circuit courts uniformly consider both the Secretary's views and the Commission's interpretations, and after properly scrutinizing each, defer to the most reasonable interpretation under the facts and circumstances of each case." *Id.* at 16. In striking contrast to respondent's statement, the courts of appeals themselves have recognized a severe split of authority concerning the question of deference in the OSH Act context.[4] Additionally, respondent's statement that courts "uniformly" defer to the most reasonable interpretation is flatly inconsistent with courts of appeals decisions emphasizing that the interpretation of the entity receiving deference will prevail (if it is reasonable), even if it is *less* reasonable than the interpretation of the

[4] See, *e.g.*, *Donovan* v. *A. Amorello & Sons, Inc.*, 761 F.2d 61, 64 (1st Cir. 1985) ("The courts of appeals differ about the proper judicial attitude when OSRHC and OSHA are at odds about a regulation's meaning."); *Marshall* v. *Western Electric, Inc.*, 565 F.2d 240, 244 (2d Cir. 1977) (noting that "the courts have differed in deciding what deference to give the Commission's interpretations of health and safety regulations, especially when such interpretations conflict with those of the Secretary"); *United Steelworkers* v. *Schuylkill Metals Corp.*, 828 F.2d 314, 319 (5th Cir. 1987) ("This is an issue over which the courts of appeals have splintered."); Pet. App. 4a ("Whether judicial deference under OSHA is accorded to the regulatory interpretations of the Secretary or the Commission is an issue upon which the federal circuits are split."). Cf. *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 n.2 (D.C. Cir. 1986) ("Other Circuits are divided on the analogous question whether the Secretary or the Occupational Safety and Health Review Commission is due deference with regard to interpretation of the Secretary's regulations issued under the Occupational Safety and Health Act.").

entity not receiving deference.[5] Respondent's contention that "a 'deference rule' would rarely, if ever, be outcome determinative" (Br. in Opp. 17) is similarly belied by courts of appeals decisions explicitly holding that the issue of deference is outcome-determinative.[6]

As part of its attempt to minimize the split in the courts of appeals, respondent also seeks to recharacterize decisions from the Second, Sixth, and Ninth Circuits, and disputes our contention that those decisions support deference to the Commission. Br. in Opp. 15-16 & n.12. But several courts of appeals, including the court below, agree

[5] See, *e.g.*, *Brock* v. *Williams Enterprises of Georgia, Inc.*, 832 F.2d 567, 569-570 (11th Cir. 1987) ("Because the Secretary of Labor promulgates the regulations under the Occupational Safety and Health Act of 1970 * * * his reasonable interpretation of those regulations is controlling, even though his interpretation may not appear as reasonable as the Commission's interpretation") (footnote omitted); *United Steelworkers* v. *Schuylkill Metals Corp.*, 828 F.2d at 319 ("We have held repeatedly that the *Secretary's* interpretation is controlling as long as it is one of several reasonable interpretations, although it may not appear as reasonable as some other.") (internal quotation marks omitted). Indeed, respondent's statement that courts "uniformly" consider the reasonableness of both the Secretary's and the Commission's interpretations and defer to the most reasonable interpretation is inconsistent with respondent's characterization of the court of appeals decision in this very case. See Br. in Opp. 13 ("[T]he court did not express an opinion as to whether the Secretary's interpretation was reasonable.").

[6] See, *e.g.*, *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974) (statutory question can be answered "either way"; Commission's interpretation accepted, and Secretary's interpretation rejected, because of deference); *United Steelworkers*, 828 F.2d at 320 ("[i]n this case, the standard of review determines the outcome"; Secretary's interpretation accepted, and Commission's interpretation rejected, because of deference). Respondent notes the statement by the *Steelworkers* court that it had "consider[ed] carefully both the decision of the Commission and all the arguments of the appellee's" (Br. in Opp. 17 n.13); the court's statement regarding its careful consideration obviously did not detract from its explicit statement that deference to the Secretary was its *ratio decidendi*.

with our reading of those decisions.[7] Moreover, in addition to the Second, Sixth, and Ninth Circuits, both the court of appeals in this case and the Fourth Circuit have held that deference to the Commission is appropriate when the interpretations of the Secretary and the Commission conflict.[8] In stark contrast, the First, Fifth, Seventh, and Eleventh Circuits have held that deference to the Secretary is appropriate. See Pet. 10; Pet. App. 4a.[9] Thus, contrary to respondent's contention, the split in the courts of appeals is genuine and widespread.

3. Respondent also raises scattered additional objections to review of this case. Having vigorously litigated the case in the Commission and in the court of appeals, respondent now suggests that the closing of its facility in 1982, as well as its unfunded pension liability, may counsel against review. Br. in Opp. 22 & n.18. But as respondent recognizes (*id.* at 22 n.18), in view of the pendency of the $10,000 citation, this case is not moot. Respondent also suggests that this particular case is not significant in the context of the OSH Act because the Secretary could have invoked 29 C.F.R. 1910.1029(g)(4)(i), rather than 29 C.F.R. 1910.1029(g)(3) (with its incorporation of the general standard in 29 C.F.R. 1910.134). Br. in Opp. 23. Respondent overlooks the fact, however, that the Commission's interpretation of 29 C.F.R. 1910.134, now affirmed by the court of appeals under a deference-to-the-Commission theory, is applicable to a wide range of industries; it is not limited to the coke oven emissions context, the only context in which the option of invoking 29 C.F.R. 1910.1029(g)(4)(i) is available.[10] Finally, with regard to respondent's comments on the merits (Br. in Opp. 19-22), we discussed in our petition

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[7] See Pet. App. 4a (noting that "the Second, * * * Sixth, * * * and Ninth Circuits defer to the Commission"); *United Steelworkers*, 828 F.2d at 319 n.3 (noting that the "Second, * * * Sixth, * * * and Ninth Circuits defer to OSHRC"); *Donovan* v. *A. Amorello & Sons*, 761 F.2d at 64 (noting that the "Sixth Circuit * * * and possibly the Second Circuit seem to favor the Commission"); *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 537 n.2 (noting that the "'Sixth * * * and possibly Second Circuits favor the Commission'"). Because the Ninth Circuit decision was issued after the decisions in *A. Amorello & Sons* and *Cathedral Bluffs*, it obviously could not be included in those decisions.

It is not surprising that these decisions characterized the Second, Sixth, and Ninth Circuits as favoring deference to the Commission, in view of the explicit language in the opinions from those circuits. See *Marshall* v. *Western Electric, Inc.*, 565 F.2d at 244 (2d Cir.) ("Although the courts have differed in deciding what deference to give the Commission's interpretations of health and safety regulations, especially when such interpretations conflict with those of the Secretary * * * this court has consistently held that its role 'is to decide whether the Commission's interpretation of the Regulation is unreasonable and inconsistent with its purpose * * *.'"); *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127, 132 (6th Cir. 1978) ("Where, as here, the Secretary of Labor and the Commission differ over the construction of the Act, we have indicated that the Commission's ruling is entitled to great deference."); *Brock* v. *Bechtel Power Corp.*, 803 F.2d 999, 1000 (9th Cir. 1986) ("[I]n a case such as this, where the Secretary and the Commission disagree as to the meaning and application of the regulation, the court need not grant * * * deference to the Secretary's interpretation. * * * Instead, we will defer to the Commission's expertise in exercising the independent adjudicatory function assigned it by the Act * * *."). Notably, respondent claims that *Usery* and *Marshall* are nevertheless inapposite because, in those decisions, the court went on to reject the Commission's interpretation as unreasonable. Br. in Opp. 15-16 & n.12. Respondent's objection, however, misunderstands the proper role of deference—although deference is extremely important and often outcome-determinative, it is not unbounded. See *Udall* v. *Tallman*, 380 U.S. at 16-17.

[8] See Pet. App. 2a; *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d at 1261-1262.

[9] Except for its comment regarding the Fifth Circuit's *Steelworkers* decision (see note 6, *supra*), respondent does not address the decisions holding that deference to the Secretary is required when the Secretary's interpretation and the Commission's interpretation conflict.

[10] Respondent also implies that the Commission interpreted 29 C.F.R. 1910.1029(g)(3) as incorporating *only* 29 C.F.R. 1910.134(b). Br. in Opp. 6 n.5. That implication is incorrect. See Pet. App. 40a-45a.

why we believe that the court of appeals' analysis is erroneous. See Pet. 11-18. Respondent's counter-arguments may properly be addressed in consideration of the merits, but they do not provide a basis for denying review.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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